Cases of Interest for Fraud Practitioners

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This is the latest edition of the Littleton Civil Fraud Group's newsletter. As with previous newsletters, these case summaries provide a brief snapshot as to cases/points of interest for fraud practitioners. Many of these cases are incredibly complex, and this newsletter cherry picks a small number of points that stand out.

Some themes that emerge:

1. The scale and complexity of fraud claims being litigated in the English Courts continues to astound (see Hildyard J. describing the ***Autonomy*** trial as one he believed ***"may rank amongst the longest and most complex in English legal history"***).
2. Whilst creative attempts have been made to try and carve these cases up (see ***Jinxin***) there remains reluctance amongst the judiciary to consider issues that arise in deceit/fraud claims in isolation.
3. Further, where the Claimant's fraud claim is built upon the drawing of inferences it is difficult to dispose of such claims summarily (see ***Arcelomittal*** and ***VP Fund Solutions***), but on the right facts, there is scope for doing so.
4. At trial, the Courts continue to take a broad approach to analysing legal issues (see ***Autonomy, ED&F Man*** and ***Ivy Technology***); technical legal points are not typically allowed to stand in the way of an otherwise successful fraud claim.
5. When deciding on jurisdiction, the Courts are astute to ensure jurisdiction is only exercised in an appropriate case, even when the party challenging jurisdiction does not turn up (see ***Chep***)!
6. In a claim where deceit lies at its heart, the place where the relevant deceit occurred is likely to be a powerful factor as to where the case should be tried (see ***Gulfvin***).

Nick Goodfellow, Civil Fraud Group Members

10 November 2022

Case 1

ED&F Man Capital Markets v Come Harvest Holdings Ltd **[2022] EWHC 229 (Comm)**

Queen's Bench Division (Commercial Court) (Calver J.): 16 February 2022

High value metals fraud claim based on forged warehouse receipts

The Claimant (MCM) was deceived by forged warehouse receipts (FWRs) into entering into purchase contracts for parcels of nickel with the First and Second Defendants (CH and MW), when the receipts did not confer title to any nickel, which belonged to the Tenth Defendant (Straits). MCM succeeded in claims for (inter alia) deceit and unlawful means conspiracy, rescinded the relevant purchase contracts with CH and MW, and was awarded damages in the sum of circa. USD 282 million.

The Judge rejected (obiter) an argument by Straits that it is not sufficient if the defendant (in a conspiracy claim) intended to harm a third party or class of persons: see [479]-[529]. The Judge considered that the current and established state of the law remains that laid down by Lord Hoffman and Lord Nicholls in **OBG**, namely that a specific intention to target the defendant is **not** required: see [500] et seq.

In addition, the Judge rejected Straits' argument that it needed to know the specifics of the unlawful means used in the conspiracy, namely the use of the FWRs. Instead, it was sufficient if the unlawful means were ***"indeed the means"*** that caused the loss: see [533]-[547].

Case 2

Chep Equipment Pooling BV v ITS Ltd **[2022] EWHC 741 (Comm)**

Queen's Bench Division (Commercial Court) (Richard Salter QC, sitting as a Deputy High Court Judge): 1 April 2022

Focus on where the conspiracy was formed for the purpose of jurisdictional gateway

The Claimant (incorporated in Belgium), a pallet manufacturing business, brought claims against the First Defendant (D1, incorporated in the Isle of Man) and the Second Defendant (D2, incorporated in Estonia) for dishonest assisting the Third to Fifth Defendants (Ds3-5, all individuals) to act in breach of fiduciary duty, and for unlawful means conspiracy. The Claimant alleged that the Defendants conspired to use unlawful means (being breach of fiduciary duty) to injure the Claimant, by causing it to make higher payments for pallets than it would otherwise have made under a supply agreement, to its disadvantage, and the advantage of the First Defendant.

Each defendant contested jurisdiction: D3's challenge was successful; an agreement was reached with D4; D5 withdrew his challenge; and Ds1-2 challenge was maintained, but they did not attend the hearing of the application.

The Judge considered whether to dismiss Ds1-2's application without considering the merits, but (whilst acknowledging that such a course was open as a matter of discretion – see [7]) decided that ***"it is important for the Court always to satisfy itself that any jurisdiction which it exercises over parties is one that is soundly based in law"*** (see [12]).

The Judge rejected D1-2's challenge on the merits. In deciding that the Claimant had established a good arguable case that damage had been sustained from an 'act committed within the jurisdiction' in respect of the conspiracy claim; the Judge considered the question is where the ***"substance of the cause of action arises"*** (see [32.1.1]). Applying previous case law, the Judge considered that it is appropriate, when considering this 'gateway', to focus on the ***formation*** of the conspiracy rather than upon the steps taken subsequently to implement it (see [32.1.2]-[32.1.4]).

Case 3

Gulfvin Investment Ltd v Tahrir Petrochemicals Corp SAE **[2022] EWHC 1040 (Comm)**

Queen's Bench Division (Commercial Court) (Andrew Baker J.): 4 May 2022

Permission to serve out set aside in Texas deceit claim

The Claimant (Gulfvin) brought claims in unjust enrichment and deceit arising out of its entry into a share purchase agreement (SPA) relating to the shares in a Cayman Island incorporated company (CHL), founded by the Second Defendant (EB), an individual domiciled in Egypt. Gulfvin was incorporated in the Cayman Islands and carried on business in Texas. The SPA was negotiated in Texas.

The restitution claim was governed by English law, because the proceeds of monies paid under the SPA were made into an account in London; the Judge considered that might well mean England and Wales was distinctly the most appropriate forum for ***that*** claim (see [39]). However, the deceit claim connected the litigation predominantly to Texas (see [29]), and weighing in the balance all of the features of the litigation, England and Wales was not clearly or distinctly a more appropriate forum than Texas. Further, the fact that the restitution claim was a ***"minor element"*** of the claim also tipped the balance in favour of Texas (see [40]).

Case 4

ACL Netherlands BV (As Successor to Autonomy Corp Ltd) v Hewlett-Packard The Hague BV **[2022] EWHC 1178 (Ch)**

Chancery Division (Hildyard J.): 17 May 2022

Fraud claim based on USD 11.1 billion share acquisition in tech company

"Fraud on a grand scale; or relentless witch-hunt?" (see [1]) The Judge decided it was the former.

In January 2012, 100% of the share capital in Autonomy Corporation plc (Autonomy) was purchased by a special purpose vehicle (Bidco) that was incorporated by Hewlett-Packard Company (HP) for the purpose of the acquisition. The First and Second Defendants had been directors of Autonomy until 2011, and were persons discharging management responsibilities for the purpose of the Financial Services and Markets Act 2000 (FSMA).

The central claim advanced was that Autonomy was mis-sold; Bidco had paid much more than the company was worth, induced by fraudulent misrepresentations contained in Autonomy's published information. In November 2012, Autonomy's value was written down by HP in the sum of USD 8.8 billion.

Successful claims were brought under FSMA, and (inter alia) the common law of deceit.

For the purpose of establishing reliance, it was no impediment that Bidco had only been established late in the day as a special purpose vehicle to purchase the securities in Autonomy (see [484]-[500]). The Judge held that for the purpose of the acquisition, HP was to be treated as the controlling mind of Bidco, and that HP's reliance was to be ***"treated as"*** Bidco's reliance (see [500]).

As to the test for inducement, the Judge held that in order for an untrue statement to have ***induced*** the acquisition, the information must have been considered by the acquirer; it must have been present in their mind when they took the relevant decision (see [503]-[505]). However, the Judge observed that (a) statements (or omissions) may ***"in combination create an impression which no single one imparts"***, and (b) ***"if the overall impression thus created is false it may found a claim"*** (see [506]).

Case 5

Ivy Technology Ltd v Martin **[2022] EWHC 1218 (Comm)**

Queen's Bench Division (Commercial Court) (Henshaw J.): 20 May 2022

SPA fraud claim succeeds based on broad scope of agency

The Claimant (Ivy) purchased an online gaming business made up of various corporate entities (the Business) under a share purchase agreement (SPA) entered into with the First Defendant (Mr Martin). The Second Defendant (Mr Bell) was, prior to the SPA, a beneficial owner of 50% of the shares in the Business, but was not named on the face of the SPA, and (save for one meeting held in Prague) did not communicate directly with Ivy during the negotiation of the SPA.

Ivy brought claims in deceit and unlawful means conspiracy based on fraudulent misrepresentations connected with the financial state of the Business.

In upholding the claims in part, the Judge held that even though Mr Bell had not become a party to the SPA despite his 50% beneficial ownership, Mr Martin was authorised to make representations to Ivy on Mr Bell's behalf. The Judge considered that because Mr Bell had told Mr Martin to ***"get on with a sale if that is what he considered best and get the debts paid off"***, in the particular context of the case, he had expressly conferred authority on Mr Martin to make whatever representations he considered appropriate in that connection, and that Mr Bell was liable as ***principal*** for representations

that Mr Martin made to Ivy acting as his agent (see [505]-[509]). This was in addition to Mr Bell's direct personal liability for endorsing a statement made by Mr Martin at the meeting in Prague that the Business was profitable, (see [458] and [474]) when in fact it was not.

Case 6

Arcelormittal North America Holdings LLC v Ruia **[2022] EWHC 1378 (Comm)**

Queen's Bench Division (Commercial Court) (Picken J.): 9 June 2022

Unsuccessful strike out application by defendant director in USD 1.5 billion conspiracy claim

The claim concerns an alleged conspiracy by the Defendants to put Essar Steel (a company now in administration) in a position where it lacked the financial resources to be able to meet its liability to the Claimant (ArcelorMittal) under an ICC arbitration award dated 19 December 2017 in the sum of approximately USD 1.5 billion.

The Sixth Defendant (Mr Gujadhur), a former director of Essar Steel, applied for strike out, or alternatively summary judgment on the claims against him; he argued that the case was insufficiently pleaded, having regard to the strictures in pleading a conspiracy claim and/or that there was no reasonable prospect of success.

The judgment contains a helpful summary of the principles applicable on strike out/summary judgment applications (see [25]-[29]). In rejecting the applications, the Judge placed weight on (inter alia) the contention (albeit, noting that it was un-pleaded) that Mr Guajadhur had particular expertise in accountancy matters, and that this provided support for the inference that he had involvement in the underlying wrongdoing alleged, given its nature (see [75], [81] and [86]). Mr Guajadhur was in a very different position to another co-Defendant who had successfully argued the conspiracy claim against him had no realistic prospect of success (see [52] and the earlier judgment in the case [2020] EWHC 3349 (Comm)).

Case 7

VP Fund Solutions (Luxembourg) SA v GI Globinvestment Ltd **[2022] EWHC 1872 (Comm)**

Queen's Bench Division (Commercial Court) (Nicholas Vineall QC): 19 July 2022

Jurisdiction challenge in unlawful means conspiracy claim fails

The claim concerns an investment made by Italian investors into a fund that plummeted in value at the outset of the COVID-19 pandemic. The Claimants claim that it was (falsely) represented to them that the fund was entirely independent of the First Defendant (XY), the Third Defendant (owner of XY), and the Eight Defendant (CFO of XY).

The Fourth and Fifth Defendants (companies incorporated in Luxembourg and Lichenstein respectively) challenged the Court's jurisdiction to hear the unlawful means conspiracy claim advanced against them, on various grounds, including that there was no serious issue to be tried on the claim.

In rejecting the merits arguments, the Court emphasised that the test for unlawful means conspiracy

contains no requirement that the loss or injury intended by the defendant be the same, either in kind or in extent, as the loss in fact sustained by the claimant (see [32.1]). The Judge rejected an argument that even what had been pleaded by the Claimants did not satisfy the requirements of intent for the purpose of the tort (see [49]-[59]). He expressed doubt about ***"the wisdom of attempting at this early stage to submit the pleadings to close forensic analysis against particular formulations, derived in cases with different facts, as to what precisely is required by the tort"*** and emphasised that drawing the lines between what is/is not required to establish one of the economic torts, is likely to be much easier when all the facts are known, and not at the interim stage (see [50]).

Case 8

Jinxin Inc v Aser Media Pte Ltd **[2022] EWHC 2431 (Comm)**

King's Bench Division (Commercial Court) (Peter MacDonald Eggers KC, sitting as a Deputy High Court Judge): 30 September 2022

Three-stage split trial application in deceit claim fails

The Claimant (Jinxin) brings claims in deceit and unlawful means conspiracy, valued at circa USD 661 million arising out of its purchase in May 2016 of a majority stake in 'the MPS Group' that dealt in (inter alia) the sale and licensing of broadcasting rights for various football events, including the premier Italian football league, Serie A, and the FIFA World Cup.

The Sixth and Ninth Defendants applied for the trial to be determined in three stages: (1) focusing on the representations made, their meaning, and Jinxin's awareness and reliance on the same; (2) the question of falsity of the alleged representations and the tort Defendants' knowledge and intention in respect of the same; (3) remedies and quantum.

The Judge rejected the split trial application, having analysed the principles relating to split trial applications and the determination of preliminary issues (see [18]-[26]). In rejecting the application the Judge considered the requisite elements of deceit (at [30]), and found that the ***"interconnectedness"*** of various issues that fall to be considered when analysing a deceit claim, militated against the proposed three-way split (see [42] in particular). The case is ongoing.

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